DECISION

of Ethics Hearing Panel
of the Professional Standards Committee

Docket # 22-27
Filed: May 2, 2022

[redacted] v. [redacted]

FINDINGS OF FACT

The hearing panel finds the following facts in support of its conclusion regarding the alleged violation of the Code of Ethics:

REALTOR® [redacted] ("Complainant [redacted]s") and [redacted] and [redacted] (collectively, the "[redacted] Complainants") filed a complaint on May 2, 2022 alleging a violation of Articles 1 and 4 of the Code of Ethics of the National Association of REALTORS® ("Code of Ethics") against REALTOR® [redacted] ("Respondent"). The Complainants alleged that the Respondent violated the Code of Ethics by, contrary to the terms of the purchase agreement, taking possession of the earnest money from the title company and for not disclosing his interest in the subject property.

On May 18, 2022, the Grievance Committee reviewed the complaint and voted to dismiss Article 4 and to forward the complaint to the Professional Standards Committee for a hearing to determine if a violation of Article 1 occurred. The Complainants appealed the dismissal of Article 4 and the Board of Directors granted the appeal and overturned the dismissal of Article 4. A hearing was scheduled for November 1, 2022 to determine if a violation of Articles 1 and 4 occurred.

The hearing was commenced, via Zoom, on November 1, 2022 and Complainant [redacted] and the Respondent appeared personally. The [redacted] Complainants did not appear at the hearing and the Respondent objected to their absence, asserting they were crucial witnesses. As a result, the hearing was rescheduled for January 4, 2023. The [redacted] Complainants then withdrew their complaint against the Respondent.[1] The complaint was amended to remove the [redacted] Complainants and the remaining parties, Complainant [redacted] and the Respondent, appeared personally for the reconvened hearing, which was held on January 4, 2023 without objection or incident.

[1] The parties were notified that they could still call the [redacted] as non-party witnesses at the reconvened hearing, however neither party gave notice or made any attempt to call them at the hearing.

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It is undisputed that Complainant [redacted]' buyers and the Respondent entered into a Purchase Agreement on March 22, 2022. The parties agreed within the Purchase Agreement that the title company would hold the earnest money. The buyer submitted the earnest money to the title company within the timeframe specified in the Purchase Agreement. However, on April 11, 2022, Complainant [redacted] discovered that the title company had subsequently transferred the earnest money to the Respondent at the Respondent's request. Complainant [redacted] contends that because the Respondent did not honor the agreement to have the title company hold the earnest money and instead took the funds into his possession, the Respondent violated the Code of Ethics.

Complainant [redacted] testified that while the listing sheet indicated in agent-to-agent remarks that the property was "agent owned", no specific disclosure in writing was made indicating that the Respondent had interest in or was the owner of the listed property. Complainant [redacted] argues that indicating a property is "agent owned" could have multiple meanings and does not meet the requirements of Article 4. Complainant [redacted] admitted he recognized the Respondent had signed the Seller Disclosure Form and the Lead-Based Paint Form and pointed it out to his buyers prior to them signing the purchase agreement.

The Respondent testified that he made a mistake regarding the earnest money. The Respondent stated that his brokerage typically holds earnest money when he is the listing agent. The Respondent explained that he had several transactions occurring at the same time, and he followed his usual procedure of holding the earnest money. The Respondent argues that he had no ill intentions when he requested the earnest money and that upon being made aware of the mistake, he returned the money to the title company immediately.

The Respondent argues that Article 4 requires disclosure to be in writing but does not require that a specific form be used. The Respondent testified that his disclosure of his ownership, while unconventional, was given in agent-to-agent remarks indicating that the property was "agent owned", and any remaining ambiguity was resolved when he signed the Purchase Agreement, Seller's Disclosure and Lead-Based Paint form as the seller of the property.

Article 1

In relevant part, Article 1 demands that REALTORS® "treat all parties honestly." Here, it is undisputed that the purchase agreement called for the title company to act as the escrow agent and, despite this, the Respondent arranged to have those funds transferred to his own escrow account so that he could act as the escrow agent. It is also undisputed that when Complainant [redacted] pointed this out to the Respondent, the Respondent admitted his conduct and immediately returned the funds to the title company. Additionally, the Respondent testified that when the earnest money was in his possession, it was held in his own escrow account and we have no evidence suggesting otherwise.

Without question, the Respondent's conduct was in error. The Respondent acknowledges this. However, the question before us is whether the Complainant has provided clear, strong and convincing proof that the Respondent's conduct was an act of dishonesty. In his closing statement, the Complainant's REALTOR® advocate acknowledged that "we all make mistakes, some are little, and some are big mistakes." He goes on to note that interfering with earnest money belonging to clients is a "pretty

big mistake" and something that should be taken very seriously. We agree with every bit of this argument.

The Complainant's advocate continued, however, and asserted that simply due to the seriousness of the mistake, we should find it to be automatically dishonest. It is here, we must disagree. We find no support in the Code of Ethics or the *Code of Ethics and Arbitration Manual* for the argument that an honest mistake can be automatically found to be an act of dishonesty simply due to the gravity of the mistake. Additionally, we understand the plain meaning of the term "dishonest" to necessarily involve a degree of deceitfulness. Therefore, though novel, we cannot accept the Complainant's argument here and he has not met his evidentiary burden to prove that the Respondent's conduct was intentional and not an honest mistake.

Nevertheless, we wish to be perfectly clear that our finding should not be taken to minimize the seriousness of the Respondent's mistake. The Complainant is correct that even good faith mistakes can be very serious, particularly when it involves client funds. While we ultimately find no violation here, we sincerely hope – and expect – that the Respondent has learned a valuable lesson through this process. All REALTORS® get busy and may grow accustomed to doing things a certain way, however this cannot be used to excuse negligence or sloppiness with client funds. The trust our clients put in our hands when they hire a REALTOR® is sacred and it must be treated that way. We therefore respectfully admonish the Respondent to take much greater care to avoid any further mistakes of this nature in the future.

Article 4

When REALTORS® are selling property they own or have any interest, Article 4 requires that they reveal their ownership or interest in writing to the purchaser or the purchaser's representative prior to the signing of any contract. Here, we find that the Respondent (a) disclosed that the property was "agent owned" in the listing, and (b) signed both the seller disclosure form and lead-based paint form himself as the seller.[2] We also find that these disclosures were made prior to the signing of any contract and that the Complainant was aware that the Respondent had signed of each of them as the seller and had informed his buyers of this fact.

We cannot agree with the Complainant's contention that the Respondent failed to meet this obligation simply because the Respondent did not use a certain form. While IAR has developed a useful form and the BLC® contains more direct disclosure options, both of which certainly could have satisfied his disclosure obligations in an easier and less ambiguous manner, we find that Article 4 does not mandate a certain method or form for making this disclosure. The Article only requires that the disclosure is in writing and is made prior to the signing of any contract. Though unorthodox, we find that the Respondent satisfied both requirements.

[2] These forms were signed, "[redacted], Member." The entity holding title to the property was not clearly established during the hearing, however it was generally accepted by the parties that the Respondent was a member of an LLC which held an ownership interest in the property.

CONCLUSION OF THE HEARING PANEL

We, the members of the Hearing Panel in the above stated case, find the Respondent NOT IN VIOLATION OF ARTICLE 1. The Complainant did not provide clear, strong, and convincing evidence that the Respondent was dishonest regarding the earnest money.

We, the members of the Hearing Panel in the above stated case, find the Respondent NOT IN VIOLATION OF ARTICLE 4. Though unorthodox, the Respondent did disclose his ownership or interest in the property he was selling to the Complainant in writing and prior to the signing of any contract.

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The decision, findings of fact, and recommendation(s) preceding were rendered by an Ethics Hearing Panel comprised of the following members whose signatures are affixed below. The reconvened Hearing Panel met on January 4, 2023.

[redacted]

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[redacted], Chair
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NOTICE: This decision is not final and is subject to certain rights of both the Complainant and the Respondent as outlined below and provided in more detail in NAR's *Code of Ethics and Arbitration Manual*.

NOTE TO RESPONDENT: If you were found in violation of the Code of Ethics, this decision may qualify for publication under MIBOR's Publication Policy found at www.mibor.com/professionalservices. If your violation is ratified by the Board of Directors and qualifies for publication, your name and a summary of the necessary details described in the policy will be published online and available to be viewed by members for a period of three (3) years.

COMPLAINANT'S RIGHTS: Within twenty (20) days of transmittal of this notification, the Complainant may file an appeal with the President for a hearing before the Directors based only upon an allegation of procedural deficiencies or other lack of procedural due process that may have deprived the complainant of a fair hearing. A transcript or summary of the hearing shall be presented to the directors by the chairperson of the hearing panel, and the parties and their counsel may be heard to correct the summary or the transcript. No new evidence will be received (except such new evidence as may bear upon a claim of deprivation of due process), and the appeal will be decided on the transcript or summary. Any appeal must be accompanied with a deposit of $250.00.

RESPONDENT'S RIGHTS: Within twenty (20) days of transmittal of this notification, the Respondent may file an appeal with the President for a hearing before the Directors challenging the decision and/or recommendation for discipline. The respondent's bases for appeal are limited to (1) a misapplication or misinterpretation of an Article(s) of the Code of Ethics, (2) procedural deficiency or any lack of procedural due process, and (3) the discipline recommended by the Hearing Panel. A transcript or summary of the hearing shall be presented to the Directors by the Chairperson of the Hearing Panel, and the parties and their counsel may be heard to correct the summary or transcript. No new evidence will be received (except such new evidence as may bear upon a claim of deprivation of due process), and the appeal will be decided on the transcript or summary. Any appeal must be accompanied with a deposit of $250.00.

FINAL ACTION BY BOARD OF DIRECTORS: Both the Complainant and Respondent will be notified upon final action of the Board of Directors.